SUPREME COURT, U. S.

No. 73-991

Supreme Court, U. S.
FILED
FEB 26 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

SUNNYSIDE SCHOOL DISTRICT NO. 12, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The issue presented is whether the court of appeals erred in affirming the district court's grant of a preliminary injunction against petitioner's further prosecution of a state court action seeking to enjoin certain National Guard flights at the Tucson International Airport as being too noisy, the district court having concluded, *inter alia,* that the government was likely to prevail on its claim that such interference would encroach on matters preempted for federal regulation.

Petitioner, a school district, operates a junior high school near Tucson International Airport. The Arizona Air National Guard uses the Airport for various training flights. All flights from and to the Tucson International Airport, including those of the Guard, are regulated by the Federal Aviation Administration, pursuant to the Federal Aviation Act of 1958, 72 Stat.

737, *et seq.*, as amended, 49 U.S.C. 1301, *et seq.* In operating from that airport, Guard aircraft are required to comply fully with regulations and directives of the United States Air Force, the FAA, and the local FAA control tower personnel (Pet. App. 3). The Guard aircraft also comply with the "Formal Runway Use Program" implemented by the FAA at Tucson International Airport to alleviate noise, with particular respect to the school operated by petitioner and located adjacent to the airport (Pet. App. 1, 3).

In 1971 petitioner filed an action in a state court against the Governor of Arizona, as Commander-in-Chief of the Guard, seeking a permanent injunction against the Guard's use of airspace near petitioner's school, except for emergencies, on the ground that the attendant noise interfered with operations of the school. The Governor claimed that the suit was barred on the ground, *inter alia*, that it intruded upon an area preempted for exclusive federal regulation. Prior to this Court's decision in *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, the Arizona Supreme Court upheld the trial court's refusal to dismiss the action (to which the United States was not a party). *Williams* v. *Superior Court*, 108 Ariz. 154, 494 P. 2d 26.

The United States then filed the instant action seeking to restrain petitioner from interfering with exclusive federal regulation of airspace by continuing to prosecute its state court action. After the state court action had been submitted to the court for final decision, the district court granted the government's motion in the instant case for a preliminary injunction against petitioner's further prosecution of the state court action, having concluded that the government was substantially likely to prevail on the merits of its claim of preemption (Pet.

App. 1-4). The court of appeals summarily affirmed on the basis of this Court's decision in *City of Burbank* (Pet. App. 5), and rehearing was denied (Pet. Supp.).[1]

The district court's interlocutory decision on the government's motion for a preliminary injunction does not provide a necessary or appropriate occasion on which to consider the merits of the ultimate legal questions in this case to which the petition is addressed. See, *e.g.*, *American Constr. Co.* v. *Jacksonville T. & K. Ry.*, 148 U.S. 372, 384. The court's action on the motion for a preliminary injunction was not a disposition on the merits. Compare Rule 65(a)(2), Fed. R. Civ. P. Due to possible differences in the scope of relief, or for other reasons, the issues that will be raised by a final judgment in this case may well differ from those petitioner seeks to have decided at this time.

In any event, the issue before this Court in reviewing a preliminary injunction is whether the district court abused its discretion. See *Brown* v. *Chote*, 411 U.S. 452, 457. In view of this Court's decision in *City of Burbank*, the district court did not abuse its discretion in granting a preliminary injunction because of its conclusion that the government was likely to prevail on the merits.

Petitioner does not dispute that there is federal preemption as to airspace management and aircraft movement under the Federal Aviation Act. In *City of Burbank*, this Court noted, moreover, that the Noise Control Act of 1972 "reaffirms and reinforces the conclusion that FAA, now in conjunction with [the Environmental Protection Agency] * * * has full control over aircraft noise,

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[1]The Supplement to the Petition incorrectly states the date of the denial of rehearing as being August 29, 1973 (Pet. Supp.), whereas it was actually September 27, 1973.

preempting state and local control." 411 U.S. at 633. The Court concluded that the pervasive control vested in EPA and FAA under the 1972 Act left "no room for local curfews or other local controls" (*id.* at 638), finding it "obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow." *Id.* at 639. Accordingly, the Court affirmed the issuance of an injunction against the city's enforcement of its ordinance establishing a curfew on jet flights at a privately-owned airport located in the city. At the least, *City of Burbank* strongly suggests that the government is likely to prevail in the instant case.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[2]If preemption would bar state or local attempts to regulate flights to the extent sought by petitioner, it would seem immaterial whether the form of attempted regulation is statute or ordinance, administrative rule or order, or judicial decision.